



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 14, 1983

OFFICE OF
AIR, NOISE AND RADIATION

SUBJECT: Compliance Strategy for Stationary Sources of
Air Pollution

FROM: *Sheldon Meyers*
for Joseph A. Cannon, Acting Assistant Administrator
for Air and Radiation

TO: Alvin Alm, Deputy Administrator

Attached for your consideration is the final compliance strategy for stationary sources of air pollution. This document was developed by OAR's Stationary Source Compliance Division, working closely with the Office of Enforcement Counsel and with review and input by other Headquarters offices, Regional Offices, and selected State officials.

The strategy brings together in one document all of the major thrusts of the stationary source compliance program, with continued emphasis on resolution of those violating sources meeting the definition of a "significant violator". I believe there is a general consensus that the present program is sound and should continue to serve us well in the future. However, the strategy suggests three major changes for the immediate future: more flexibility for States in carrying out their inspection programs, increased use of continuous emission monitoring and similar techniques in the Agency's regulatory and enforcement programs, and increased focus on sources violating volatile organic compound (VOC) provisions in SIPs to reduce both ozone levels and air toxicants.

The major point of disagreement arising during the preparation of the strategy was the proposed revision to the inspection guidance to States. Present guidance requires annual inspection of major (Class A1) sources and biennial inspection of certain smaller sources (Class A2 sources). The draft strategy suggested allowing States to develop alternative inspection priority schemes whereby the resources otherwise required to inspect Class A2 sources could be redirected to inspection of any combination of Class A1, Class A2, and other regulated sources, as air quality needs warranted. Regional Offices were substantially divided

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on the extent to which present guidance should be revised. After a careful consideration of all the comments, we believe that the revision contained in the strategy strikes a reasonable balance between EPA's need for a nationally-consistent data base to monitor and evaluate the effectiveness of the program and the needs of State and local agencies to make optimal use of limited resources to address their most serious air quality problems.

The strategy identifies our plans to provide supplementary detailed guidance for selected subjects to enhance the long-term effectiveness of the strategy. Attached is an identification of guidance documents to be produced and anticipated completion dates.

As agreed in our October 12 briefing for you, the major subject area needing further exploration is the problem of assuring continuous compliance by air sources. The strategy already identifies certain approaches worth pursuing (e.g., greater use of continuous emission monitoring and better targeting of inspections) but we intend to do a separate, more extensive continuous compliance strategy as a follow-up to the general strategy. Because of the complexity of this issue, the continuous compliance strategy cannot hope to present "the answer" to the problem but will provide a comprehensive program for developing answers. We are targeting to complete the continuous compliance strategy by February 27, 1984, and we are proceeding to add a commitment along these lines to the Action Tracking System.

I thank you for your support in the development of this strategy and look forward to your support in its implementation.

Attachments

IDENTIFICATION OF ADDITIONAL GUIDANCE TO BE PREPARED

- (1) enforcement of VOC standards - guidance on improving the VOC inventory projected for completion by January 30, 1984. Additional guidance as needed.
- (2) use of unannounced inspections by EPA - projected for completion by September 30, 1984.
- (3) use of continuous emissions monitoring excess emissions data in the compliance program - projected for completion by July 31, 1984.
- (4) enforcement of asbestos demolition standards - projected for completion by July 31, 1984.
- (5) enforcement of PSD requirements - projected for completion by November 30, 1983.
- (6) enforcement of benzene, arsenic, and radionuclides NESHAPs - as necessary prior to promulgation.

VIII. Responding to Noncompliance Problems

A. Objectives

The objectives of responding to noncompliance problems are to ensure that the problem is corrected quickly, to deter similar problems from arising, to see that the law is applied equitably, and to punish misconduct by source owners and operators.

B. Priority Target Areas

The current system of priorities for responding to noncompliance problems is primarily delineated by two memoranda. The first is the December 29, 1981 memorandum from Kathleen Bennett to the Regional Administrators, entitled "EPA Accountability System-OANR Policy Guidance". In an appendix to that memorandum (a copy of which is included in Attachment 2), the term "significant violator" is defined, and the statement is made that these significant violators should be addressed. (This policy was elaborated upon in a memorandum of June 24, 1982, to the Regional Offices entitled "Significant Violators" (Attachment 4).) Roughly speaking, the sources to be given a high priority as "significant violators" are those violating hazardous air pollutant standards (NESHAPS), major source State Implementation Plan (SIP) violators affecting nonattainment areas, and violators of new source requirements (NSPS and requirements of Parts C and D of the Act.)

The purpose of establishing the significant violator program was to define the Agency's highest priority sources for enforcement action, other than emergency actions. In light of the special importance attached to these sources, Regional Offices are required to report on a quarterly basis on the status of efforts made by themselves and their States on resolution of these violators.

The list of significant violators is obviously dynamic, with sources being added and deleted as violations are discovered and resolved. The initial list established in March 1982 contained 482 sources.

By the December 31, 1982 report, the number of significant violators had been reduced to 303. Starting with the March 31, 1983 report, the number began to increase again. This reflected the fact that many VOC sources were subject to December 31, 1982 compliance dates. As that date passed and as violations are confirmed, those violators meeting the significant violator criteria are added. As EPA continues to improve its information on the identity and compliance status of VOC sources, it is likely that the list will continue to grow before enforcement efforts begin to turn this around.

It is generally accepted within the Agency that the significant violator program forms a sound base for the program. It is expected that this concept will continue essentially as it is for at least the next two years.

The second major priority-setting memorandum is the Agency's Post-1982 Enforcement Policy, dated September 20, 1982 (Attachment 5). This policy provides more detail for addressing SIP violators in primary nonattainment areas after December 31, 1982. (The policy does not apply when the attainment deadline is after 1982, such as in areas with Section 172(a)(2) extensions.)

In particular, the policy states that EPA or States should seek shutdown of sources subject to the policy unless:

- (1) The public interest in continued operation of the source outweighs the environmental cost of the additional period of noncompliance and;
- (2) The source has sufficient funds to comply expeditiously.

If the Agency decides not to seek shutdown, it may enter stipulations and not oppose a request to the court to exercise its equitable power to enter an order establishing a compliance schedule. Such an order should contain:

- (1) an expeditious schedule with increments of progress to comply with the SIP, or RACT if no Part D plan is in force where one is required;
- (2) interim emission limitations and controls to the extent practicable;
- (3) monitoring and reporting requirements;
- (4) stipulated penalties, at least for violations of the compliance schedule and interim controls;
- (5) provisions preventing increases of emissions;
- (6) payment of a significant cash penalty, with total civil penalties reflecting the criteria of the Civil Penalty Policy;
- (7) an express reservation of the right to seek injunctive relief, including shutdown, if the source does not comply with the order; and
- (8) consistency with the Agency's Limited Life Facilities Policy with respect to sources being shut down rather than controlled.

Further guidance on the policy was issued on January 12, 1983, in a memorandum from Kathleen Bennett and Robert Perry to the Regional Administrators and Regional Counsels (Attachment 6). This guidance clarified the policy in a number of ways, most importantly in providing further detail on criteria to be applied in review of State actions for possible overfiling. This supplemental guidance also directed the Regional Offices to issue Notices of Violation to all sources to which the policy applies, including State-lead cases, so that EPA will be in a position to act quickly if State action ultimately proves inadequate.

Since the policy was established, EPA has been working closely with States to assure its successful implementation. A high proportion of the sources which were determined to be subject to the policy have either come into compliance, been put on a

compliance schedule, or have an enforcement action pending against them. Of course, as with the significant violator program, new violators are continually being identified so that the overall number of identified violators is not necessarily decreasing. In fact, it is likely to be increasing as VOC compliance inventories and data become more complete.

Since January 1983, EPA Headquarters has been tracking on a source-specific basis initial implementation of the Post-1982 Enforcement Policy. To do this in a feasible manner, it is using the list of violators identified as of the time the policy first took effect, i.e., January 1, 1983. It has not attempted to keep a running list (adding each new violator as it is discovered). It is important to emphasize, however, that such data must be available at the State level and reported to EPA's Regional Offices in accordance with established reporting requirements. Sources subject to the policy must be addressed, whether by EPA or the State, consistent with the policy irrespective of whether the source happens to be on the list Headquarters is tracking.

Headquarters tracking of Post-1982 sources as a separate exercise is considered worthwhile only for about the first year of the implementation of the policy. Its purpose is to assure that the policy is understood and integrated into consideration of appropriate enforcement responses. For the long-term, it is preferable to eliminate separate Headquarters tracking and to rely on the significant violator program for priority-setting and tracking since, while it includes the most significant Post-1982 policy sources, it includes other important categories of sources (e.g., NSPS and NESHAPs) as well.

Because of the importance of the significant violator and Post-1982 Enforcement Policy concepts in the enforcement program and because they are different yet partially overlapping, it would be worthwhile to summarize the main points of each for comparison purposes.

Significant Violator List

- ° A priority setting mechanism to assist the Regions and States in targeting their resources to achieve the greatest environmental benefit;

- ° A defined universe used for tracking Regional program performance in the Management Accountability System;
- ° Sources are not subject to any particular substantive Agency policies purely based on their status as significant violators. Sources on the list may be subject to any of a number of substantive Agency policies;
- ° Includes NSPS, NESHAPs and certain PSD violators;
- ° Includes SIP sources in secondary nonattainment areas as well as primary nonattainment areas; and
- ° Generally includes only Class A1 SIP violators (in nonattainment areas).

Post-1982 Enforcement Policy List

- ° The sources on the Post-1982 Enforcement Policy list are those sources fitting the defined criteria established in the September 20, 1982 memo from Anne Gorsuch to the Regional Administrators and subject to the particular substantive and procedural elements of that policy.
- ° Affects only SIP sources in primary nonattainment areas (other than extension areas).
- ° Includes Class A2 sources as well as Class A1 sources.

Thus, some degree of overlap does exist between sources on the significant violator list used for MAS tracking and the list of sources subject to the requirements of the Agency's Post-1982 Enforcement Policy. However, they are distinct universes that have been established to serve different purposes.

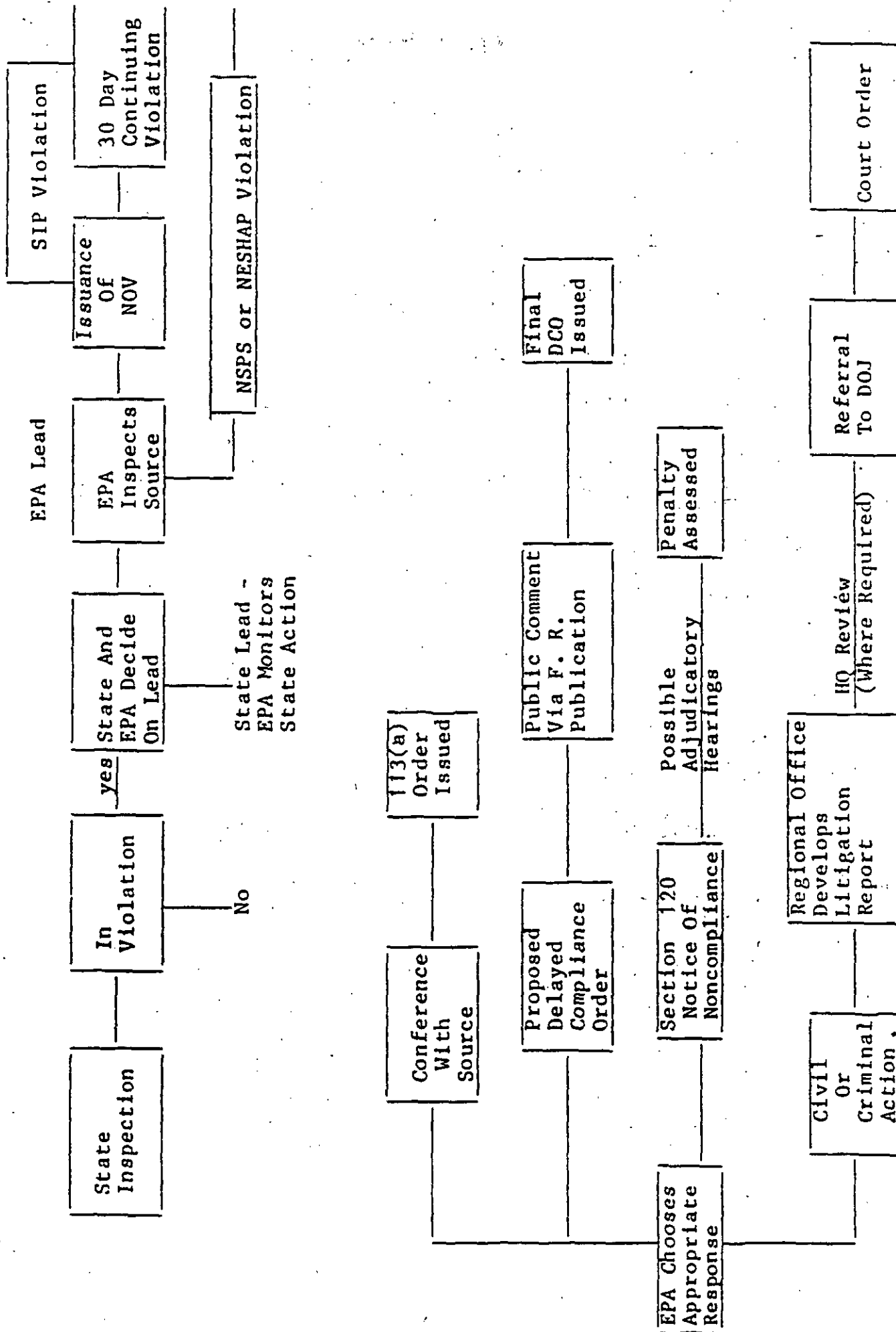
Priority will also be assigned to resolution of at least certain classes of VOC violations, irrespective of whether they meet the present significant violator definition. This includes sources smaller than the Class A1 definition in nonattainment areas to the extent that resources permit.

Certain VOC sources are of concern not only because of their contribution to ozone levels, but also because the constituents of their VOC emissions are toxic in nature. Previous efforts have focused on VOC emissions only to the extent that they impact attainment of ozone ambient standards. In FY 1985, efforts will be substantially increased to enforce VOC control requirements even in areas which are projected to be attainment or unclassified relative to the ozone NAAQS, where the enforcement of VOC control requirements can yield significant benefits through reduction in air toxics. The special problems associated with VOC sources will be discussed at greater length in Section IX B.

In addition to the priorities set by the documents cited above, several other aspects are important to note. The highest priority should be given to any emergency episode which may arise as defined in Section 303 of the Act. Expanded guidance for response under Section 303 was sent to Regional Offices on September 15, 1983 and is included as Attachment 7. The essential point to note about this guidance is that it urges a broader consideration of the use of Section 303 authority. In the 1970's, emergency episodes (and thus use of Section 303) were viewed almost entirely in the context of high levels of criteria pollutants under adverse meteorological conditions. This occurs only infrequently these days, at least for pollutants associated primarily with stationary sources. However, the serious threats presented to public health by various air toxic substances have become much more visible. The purpose of the guidance is to foster a broader awareness of the possible use of Section 303 as a mechanism to address, in proper circumstances, the dangers presented by such emissions.

Similarly, while already covered as "significant violators", special note should be made of enforcement against violations of hazardous air pollutant standards. This will consist primarily of continued enforcement of vinyl chloride standards, enforcement of asbestos demolition standards, and initial implementation (enforcement or waiver issuance) of newly-promulgated NESHAPs standards. Enforcement of NESHAPs standards is discussed at some length in Section IX A.

Stationary Source Compliance Process



Finally, priority should be given to addressing violations of Section 114, which sets out the Agency's information-gathering authority, because that authority is so basic to EPA's ability to set and enforce the substantive requirements called for by the Act. Similar high priority should be assigned by EPA Regional Offices to violators of EPA orders or Federal judicial decrees.

Note that these priorities reflect considerations at the national level. Obviously, conditions at the State and local level vary widely. The listing of these national priorities should in no way be interpreted as condoning a failure to address other important air quality problems, such as violating sources in attainment areas, to the extent consistent with other priorities and available resources.

C. Informal Responses

When EPA or a State first learns of a noncompliance problem, it may be possible to remedy the problem by informal discussions with the source which lead to a quick (generally within 30 days), complete resolution. If this is not possible, however, a more formal response should be considered. In addition, if the violation appears to be part of a continual pattern of intermittent violation, it may be preferable to document the violation with a Notice of Violation even if quickly remedied. This may be taken more seriously by the source, help focus attention on the source in inspection targeting, and lay the foundation for a more aggressive response to any subsequent violations.

D. Formal Responses

Diagram #1 provides a simplified flow diagram of the formal enforcement process. Normally, the State or local agency will take the lead in addressing problems of noncompliance. If a State takes the lead, EPA should understand what action the State is contemplating and the timetable for that action so it can make a reasoned judgment on deferral to the State. This understanding should be documented in the form of a State action plan. This could be

prepared either by the State or by EPA with a State review for accuracy. The Regional Office should then get periodic reports on the progress of that action so that, if progress is not timely, a decision can be made to reconsider the deferral.

In some instances, it may be advisable for the Regional Office to begin case development activities even while the State maintains the lead on a case. In fact, this is specifically required for sources subject to the Post-1982 Enforcement Policy. The purpose of this is to allow EPA to act much more quickly if it ever had to take the lead on the case. These activities would, of course, have to be coordinated with the State in a way that makes it clear to both the source and the State that EPA regards the State as maintaining the primary responsibility and is continuing to look to the State to resolve the matter.

When the EPA Regional Office finds that the State or local agency has not effectively addressed a violating source and will not be proceeding in a timely and effective manner, it should initiate a Federal enforcement action against the noncomplying source. In evaluating a State action, several factors should be considered:

- (1) If the source is in compliance with a schedule contained in a State decree order, EPA would examine the expeditiousness of the compliance schedule (including the incremental dates in the schedule). EPA would also examine the past compliance history of the source and the record of State enforcement to determine whether the final compliance date in the schedule is likely to be met or if it is simply a "moving target", and likely to be revised.
- (2) If the source is in violation and no schedule has been established or, though a schedule exists, the source is not meeting it, EPA would examine both the schedule (if one exists) and what the State is doing to remedy the situation. Any violation extending more than six

months without effective action would be of particular concern. EPA would look at the past compliance history of the source and the record of State enforcement actions as an indication of whether the State is likely to resolve the problem effectively.

- (3) In cases where circumstances indicate that the State will not be able to effect compliance, EPA would consider the significance of the source relative to other priorities and determine whether EPA action was warranted.
- (4) For sources subject to the Post-1982 Enforcement Policy, there is an additional set of items which an adequate court or administrative order should include, as previously discussed. The most notable of these is that there should be a significant cash penalty. Thus, for these sources, EPA may need to conduct a penalties-only action under either Section 113 or Section 120 if the State action is adequate in every way except that no penalty was obtained.

Once a Regional Office has decided to initiate a Federal action, it must first decide whether to pursue the matter as a criminal, administrative, or civil enforcement action. Section 113(c) of the Act provides criminal sanctions for violations of certain requirements of the Act. EPA must identify the cases it intends to address with a criminal enforcement action early in the case development process to assure that the Agency protects the potential defendant's rights and to assure the integrity of the criminal enforcement process. When a Regional Office receives information indicating the likelihood of criminal activity, it should refer that information to the Criminal Enforcement Division at EPA Headquarters for further investigation and prosecution in accordance with the "General Operating Procedures for the Criminal Enforcement Program" issued on October 29, 1982.

When a Regional Office decides to initiate an administrative or civil action against a violating source, the Region frequently must initially obtain information from the source that will support the enforcement action. EPA may use its information-gathering authority under Section 114 of the Act to

require the source to provide the Agency with information concerning its compliance status. Section 114 of the Act authorizes EPA to require sources to establish and maintain records, install and use monitoring equipment, perform emission tests, admit inspectors, and, in general, provide the information EPA requires to determine whether the source is in compliance. Once the response to the Section 114 letter is analyzed, an inspection of the source to document the violation more thoroughly is often required.

To begin an administrative or civil enforcement action relating to a SIP violation, EPA must issue a Notice of Violation (NOV) under Section 113(a) of the Act. Once EPA has issued an NOV, the violator has thirty days to remedy the violation. No prosecution can occur if the violating source comes into compliance within the thirty days following the issuance of an NOV. This NOV step is not required for NSPS or NESHAP violations. For those violations, EPA may proceed immediately with an administrative order or a civil or criminal action. EPA may use its information-gathering authority under Section 114 of the Act to determine whether a violation continues to exist thirty days after the issuance of an NOV. A follow-up inspection can be performed to document the continuing violation where required. In addition, if the Section 113 conference with the source to discuss the NOV is held more than 30 days after the issuance of the NOV, an admission from the source might be sought at the conference. If a violation persists beyond thirty days, or if the violation concerns NSPS or NESHAPs where no NOV is required, EPA may issue an administrative order under either Section 113(a) or Section 113(d) or initiate a civil judicial action under Section 113(b). In addition, for certain new source violations as discussed below, an administrative order may be issued or judicial action initiated under Section 167.

A Section 113(a) order is an administrative enforcement mechanism which is often effective in bringing a source into compliance quickly. It is most effective where operation and maintenance problems exist. Reading Section 113(a) in conjunction with Sections 110(i) and Section 113(d), it appears that there are strict limits on the extent to which Section 113(a) orders can be used for SIP violators. Thus, EPA has concluded that such orders

must require immediate compliance, defined as within 30 days of the effective date of the order. This limit does not apply to NSPS and NESHAP violators. For these sources, a longer period of time may be granted in a Section 113(a) order, but only when the need for additional time arises from circumstances beyond the control of the source, i.e., force majeure situations. These concepts are discussed in more detail in an April 30, 1982 memorandum from Kathleen Bennett to the Regional Administrators, entitled "Duration of Section 113(a) Orders" (See Attachment 8).

Another type of administrative enforcement mechanism is that used to halt illegal construction of a new or modified source in violation of Part C or D of the Act. For violations of the Prevention of Significant Deterioration (PSD) requirements in Part C, the appropriate order to be issued is one under Section 167. Such an order can be issued against:

- (1) A major emitting facility if it should have obtained a PSD permit but has not;
- (2) A source being constructed or operated pursuant to a State-issued PSD permit that conflicts with the requirements of the Clean Air Act, implementing regulations, or approved SIP requirements; and
- (3) A State if EPA has delegated the PSD program to the State and the State is about to issue a PSD permit which EPA believes is inconsistent with Part C or its implementing regulations.

Proposed detailed guidance regarding the use of Section 167 was sent to the Regional Offices for comment on July 7, 1983. Final guidance, reflecting a consideration of comments received, will be issued in the near future.

For violations of the new source review requirements of Part D, an available administrative enforcement mechanism is a Section 113(a)(5) order. This section requires that the Administrator make a finding that a State is not acting in compliance with the regulations referred to in Section 129(a)(1) of the

Clean Air Act Amendments of 1977 (the offset ruling) or any plan provisions required by Section 170(a)(2)(I) and Part D. Once this finding is made, EPA may issue an order under Section 113(a)(5) to a major source requiring it to refrain from or cease construction unless a valid permit is obtained from the State.

Authority to issue Section 113(a) and Section 167 orders has been delegated to Regional Administrators. Issuance of a Section 113(a)(5) or Section 167 order requires consultation with the Director, Stationary Source Compliance Division and the Associate Enforcement Counsel for Air at Headquarters. Issuance of a Section 113(a) order other than under Section 113(a)(5) requires no consultation with Headquarters.

If a source does not obey a Section 113(a) or Section 167 order or if EPA decides that a civil action is needed, the Agency may proceed in the courts under either Section 167 or Section 113(b). EPA may ask for any necessary injunctive relief under either section and, under Section 113(b), may seek civil penalties of up to \$25,000 per day of violation. A Section 167 action, unlike one under Section 113(b), does not require a Notice of Violation and documentation of a 30-day continuing violation.

Section 113(d) of the Act provides EPA and States with another administrative remedy, known as a Delayed Compliance Order (DCO). Under a DCO, EPA or a State may establish a schedule which requires compliance no later than three years after the source's SIP compliance date. (State-issued DCO's to major sources require EPA approval to be effective as a DCO.) A source which has been granted a DCO and which is in compliance with the terms of that order is not subject to further enforcement action under Section 113 for violations during the period of the DCO. However, major stationary sources can be required to pay a noncompliance penalty under Section 120 (see below), notwithstanding the DCO.

Due to the three-year limit for a DCO previously noted, there are relatively few sources eligible for DCO's for particulate matter or sulfur dioxide emission limit violations. Most of those limits were accompanied by SIP compliance deadlines more than three years past.

DCO's are much more widely available for sources violating volatile organic compound emission limits, many of which had final compliance dates of mid to late 1982.

There are two other types of DCO's which will not be discussed at length in this document, those issued under Sections 113(d)(4) and (5). While they serve important purposes, fostering use of innovative technology (Section 113(d)(4)) and conversions to coal by fuel-burning sources (Section 113(d)(5)), their application is highly limited. For similar reasons, this strategy will not discuss use of non-ferrous smelter orders under Section 119 of the Clean Air Act.

Before EPA issues a DCO, the source must meet the eligibility requirements in Section 113(d) of the Act. States may also issue DCO's but, as previously noted, any DCO issued to a major source requires EPA approval before it is effective.

Guidance regarding DCO's appears in various Agency memoranda, the most significant of which were compiled in an April 26, 1983 memorandum from Kathleen Bennett and Courtney Price to the Regional Administrators and Regional Counsels (Attachment 9). Procedures for processing delayed compliance orders are contained in Part 65 of 40 CFR. Further guidance is contained in the April 26, 1983 memorandum.

It should be clear from the description of the Agency's administrative order authority that such orders are limited and cannot be used to address many of the violations which EPA faces. Therefore, many of the EPA enforcement actions will come in the form of Section 120 proceedings (described next) or civil actions filed in Federal district courts.

In cases where a source is not in compliance with emission requirements, EPA may also seek non-compliance penalties under Section 120 of the Act. EPA may seek these penalties in addition to any relief under Section 113 of the Act. Section 120 is designed to recapture, in an administrative proceeding, the economic savings realized by sources in violation of applicable emission limits. While Section 120 is, by its terms, a penalty provision only, the prospect of a Section 120 penalty can often serve as a useful stimulant to prompt a source to come into compliance.

EPA initiates an action under Section 120 by issuing to the source a Notice of Noncompliance. Although adjudicatory hearings may occur before a source must pay a penalty, the penalty starts to accrue from the date EPA issued the Notice of Noncompliance. Consequently, it is often in the source's best interest to achieve compliance expeditiously and not frivolously use the administrative hearing process as a mechanism for delaying achieving compliance.

Of the formal responses previously outlined, Section 120 has been the most underused (approximately twenty cases so far). Efforts have been made and will continue to be made to increase its use by Regional Offices. Region II has been particularly effective at using Section 120 to encourage quick compliance. (See the memorandum discussing the use of Section 120 included as Attachment 10.)

If a Regional Office finds it appropriate to pursue litigation as its course of action for a violating source, it prepares a litigation report containing the factual and legal basis for its action and refers the report through appropriate procedures to the Department of Justice which, as the Federal government's attorney, litigates the matter on EPA's behalf.

One other possible sanction is the listing program under Section 306. It enables EPA to prevent a violating source from receiving any Federal contracts, grants, or loans once it is placed on the List of Violating Facilities. This program is coordinated by the Office of Enforcement Counsel (OEC) at Headquarters. It should be used much more extensively than it has been because it is a very powerful enforcement tool. Further guidance on the appropriate uses and procedures for Section 306 is being developed by OEC. In any event, it is important to note that listing under Section 306 is mandatory for facilities which are the subject of criminal convictions where the underlying violations have not been corrected. These listings should not await the development of further guidance.

Finally, it should be noted that it is expected that Federal facilities will fully comply with all applicable air pollution control requirements. EPA should respond promptly and vigorously to any viola-

tions under the same priorities established for other sources, making full use of the mechanisms of Executive Order 12088 and implementing procedures established by the Agency's Office of Federal Activities. State and local agencies are also encouraged to participate in the program to the maximum extent possible.

E. Considerations in Selection of an Appropriate Response

This section discussed considerations in selecting the appropriate vehicle for a Federal enforcement response once the decision has been made that a Federal response is appropriate. It is not intended to be prescriptive in nature, given that selection of a response must be based on a reasoned evaluation of all the circumstances of the case.

As previously noted, the first judgment to be made is whether to pursue a criminal action. While simultaneous civil and criminal actions are not prohibited, they should generally be avoided.

Priorities for criminal enforcement should include the following: knowing violations of State Implementation Plans that result in, or threaten, significant environmental contamination or human health hazard; knowing violations of NESHAPs requirements; and falsification of records or tampering with monitoring devices which has, or could be expected to have, a significant impact on EPA's regulatory process or decision-making. These priorities were set forth in an October 12, 1982 memorandum from Robert Perry to Regional Counsels, entitled "Criminal Enforcement Priorities for the Environmental Protection Agency."

Two other areas also deserve serious consideration for criminal investigation: criminal contempt for willful violations of civil consent decrees (punishable under 18 U.S.C. §401(3)) and violations of reporting requirements imposed by Section 114 letters.

For the large majority of cases, a criminal action would not be an appropriate response. Therefore, the other options detailed in the preceding section should be considered.

In deciding between administrative orders and civil actions, judgments should reflect a consideration of the likely effectiveness of each

option rather than artificial notions of "toughness". In the proper circumstances, an administrative response can be as effective as a judicial one.

In considering the use of a Section 113(a) order, the major factor is whether compliance can reasonably be required within 30 days. (Note that in the case of an NSPS or NESHAPS violation, this limitation does not apply if the violation arises from a force majeure event.)

In cases where compliance can be required within that period, a Section 113(a) order is often the best response since it can be issued simply and quickly. A Section 113(a) order should normally be used only where it is expected that the order may be complied with, however.

If it is felt that the source will not comply with the order, it probably would be better to select another option. This is especially true if the Regional Office believes that the source may attempt to challenge the order in a Court of Appeals under Section 307(b)(1) as a final Agency action. Since an EPA enforcement action must be brought at the District Court level, actions which invite collateral lawsuits at the Court of Appeals level should be avoided wherever possible.

Where a Section 113(a) order is not appropriate, the election generally will be between a DCO, a Section 120 action, and a civil action. (This, of course, presumes that a DCO is available.)

If a DCO is available, its use by EPA is most appropriate in cases where a source requires additional time to comply due to an unforeseen inability to comply and is acting in good faith to meet its emission requirements. This is because EPA has not routinely sought penalties for a source being issued a DCO for the period before the DCO is issued, although this is legally permissible. As noted in the July 28, 1978 guidance on use of Section 113 orders (included as part of Attachment 9):

The issuance of delayed compliance orders by either the States or EPA is discretionary. In exercising its discretion, EPA will consider any past compliance efforts and any prior State or federal enforcement actions involving the source. If, based on these and other relevant

factors, EPA determines that the source is one with an egregious history of noncompliance, recalcitrance, or environmental harm and/or that court supervision is likely to be required in order to assure expeditious compliance, the source will be considered an appropriate candidate for civil or criminal action and no federal delayed compliance order will be issued. Consequently, there will be no category of cases involving a federally issued delayed compliance order and a federal court action relating to the pre-delayed compliance order period. EPA will continue to urge the States to adopt a similar approach in exercising their discretion. However, EPA approval or disapproval of a State delayed compliance order will be based on the statutory criteria of Section 113(d). (p.5)

Another major factor in deciding whether to use a DCO is the policy that EPA will not issue a DCO unless the source formally consents to its issuance. The previously-referenced July 28, 1978 guidance states:

A delayed compliance order will not be issued unless the source indicates in writing (by signature of appropriate persons authorized to agree for the source) that it will agree to comply with the delayed compliance order. Source consent will be required for all Federal delayed compliance orders and is recommended for State delayed compliance orders as well. However, a source's agreement to comply is not precondition to EPA approval of a State delayed compliance order. (p.7)

The purpose of this consent provision is to give greater assurance that the source will comply and to minimize the possibility of a successful collateral challenge under Section 307(b)(1).

As an alternative to or in conjunction with a DCO, a Section 120 action should be considered. Because the amount of the Section 120 penalty is directly related to the length of the period of noncompliance following the issuance of a Notice of Noncompliance, it can serve as a powerful tool for prompting source compliance. However, this requires a judgment on the part of the Regional Office of how

the source is likely to respond. Where the source is not likely to respond positively, and injunctive relief will still be required, it is preferable to avoid the use of Section 120 and go directly to a Section 113(b) civil action for both injunctive relief and civil penalties. In addition, because issuance of a Notice of Noncompliance can lead very quickly to an adjudicatory hearing, a Notice should not be issued unless the Regional Office is prepared to proceed with such a hearing.

One circumstance in which a Section 120 order can be particularly useful is where the State has put the source on an acceptable schedule but has not collected penalties where penalties would be appropriate. EPA could defer to the State schedule in obtaining compliance and use the administrative mechanism of Section 120 to address the penalty issue in lieu of bringing a court action. In deciding between a Section 120 action and a court action, practical considerations such as how crowded the court docket is, the receptivity of the District Court judges to environmental litigation, and the readiness of the Regional Office to handle an almost immediate adjudicatory hearing should be carefully weighed.

Civil actions under Section 113(b) are most advantageous in the following situations:

- (a) a compliance schedule or other injunctive relief is necessary and an administrative order is unavailable or inappropriate;
- (b) the compliance history of the source suggests that the schedule should be subject to court supervision and contempt remedies;
- (c) substantial civil penalties for past violations are appropriate. (Note that in most cases, maximum penalties under Section 113(b) will be substantially greater than that under Section 120 because of the large per day amount and because Section 120 penalties run only from the date of the Notice of Noncompliance while Section 113(b) penalties are calculated back to the earliest date of provable violation.)

F. Ensuring Compliance with Response's Requirements

After Federal enforcement actions are resolved, EPA Regional Offices have the responsibility of monitoring the source's activities to ensure compliance with the terms of any administrative or court order. The Agency's Compliance Data System has the capability of serving as a tickler file for keeping track of interim and final compliance dates in schedules. It has been generally underused by Regional Offices for this purpose. In addition, a computerized system has recently been developed by the Agency's National Enforcement Investigations Center (NEIC) for tracking court ordered-schedules.

Regional Offices must conduct monitoring activities for their schedules sufficient to detect any failure to keep to the terms of the order. No detailed guidance is being provided here for this given that Regional Offices have extensive experience with schedule-tracking and because the monitoring effort reflects a case-by-case evaluation of the schedule itself and all the associated circumstances. When serious failures are detected, taking remedial action should be a very high priority, second only to emergency actions under Section 303. This is because such flouting of environmental requirements tends to undermine the entire regulatory framework, particularly if the violator is repeatedly unresponsive.

In order to enhance the enforceability of EPA's consent decrees, the Agency has developed model consent decree provisions. Some of the most important features to be included are:

- (1) Various increments in compliance schedules, so that source progress can be monitored. This avoids the situation of sudden discovery that the source is far behind its schedule. These milestones should be incorporated into CDS for easier tracking;
- (2) Reporting requirements, again to monitor source progress; and
- (3) Stipulated penalties, to provide an economic incentive for sources to meet incremental dates, as well as the final compliance date in the decree.

Naturally, it is critical for Regional Offices to monitor the progress of sources on State schedules, as well as those on Federal schedules. While the Regional Office need not be as intimately involved as the State, it needs sufficient information to assure that the schedule is being adhered to or that the State is responding vigorously to any slippage. Ultimately, EPA is responsible for assuring compliance with the Clean Air Act and the health and welfare of the American public.

IX. Special Issues

A. Enforcement of NESHAPs Standards

At the present time, there are final standards in place for certain source categories of four hazardous air pollutants: asbestos, beryllium, mercury, and vinyl chloride. Standards have been proposed for sources of radionuclides, arsenic and benzene.

Enforcement to date has focused on asbestos and vinyl chloride. Of the four pollutants already regulated, these two have posed the most significant incidence of noncompliance. The program should continue to focus on these two pollutants, but priorities may need to be altered as more standards become effective.

Adverse or conflicting court decisions currently affect the short term goals of the program with regard to asbestos and vinyl chloride. The Supreme Court, in Adamo Wrecking Company v. United States, 434 U.S. 275 (1978), held that certain requirements in the asbestos standard applicable to demolition operations were invalid because they were "work practice" requirements rather than numerical emission limitations. The court ruled that the Clean Air Act, prior to the 1977 amendments, did not authorize EPA to promulgate work practice standards. Until the asbestos standards are fully repromulgated, EPA should accelerate efforts to assure compliance with the portions of the standard which are not work practice standards, and portions which were repromulgated in 1978. Once the standards are fully repromulgated, the objective should be to assure compliance with the entire standard. (On July 13, 1983, EPA published a reproposal of the asbestos standard.)

EPA's experience with the asbestos demolition standard has suggested that an intensive, coordinated, highly visible effort to enforce these standards should be made as soon as they are fully repromulgated to establish the credibility of the enforcement effort and emphasize the importance EPA attaches to compliance with these standards. Discussions to plan such an effort have just begun and such a strategy will be developed prior to finalization of the July 13 proposal.

Compliance monitoring of asbestos sources, in the interim prior to full repromulgation of the standard, should focus on the enforceable portions of the standard. This means that monitoring should concentrate on source categories subject to a "no visible emissions" standard, including manufacturing sources, waste disposal activities, and demolition activities. Once the standard is fully repromulgated, a greater emphasis should be placed on demolition operations, which may present the most significant danger of exposure to the public of any regulated source category. Due to the transient nature of demolition operations, compliance monitoring requires quick response when notice of demolition or renovation is received. EPA's ability to assure compliance, at least as to demolitions and renovations, rests largely on self-reporting. Noncompliance by sources other than demolition and renovation operations can be detected primarily by sending observers to a source to look for visible emissions.

With regard to vinyl chloride, two recent court opinions have differed on the issue of whether the relief valve discharge provision in the vinyl chloride NESHAP is a work practice standard and is therefore invalid under Adamo. In United States v. Ethyl Corporation (No. 83-0120-A), the U.S. District Court for the Middle District of Louisiana ruled on July 1, 1983 that this provision was a work practice standard and thus invalid. However, in United States v. Borden (No. 83-1892-MA), decided on September 30, 1983, the U.S. District Court for the District of Massachusetts reached the opposite conclusion. The government agrees with the interpretation in the Borden case and intends to appeal the Ethyl decision to the Court of Appeals for the Fifth Circuit. The goal of the program should continue to be to promote compliance with the entire vinyl chloride standard, including the relief valve discharge standard. In this respect, EPA should become more active in moni-

toring compliance and enforcing other portions of the standard, which have previously not been given much attention, and will assure, through rulemaking if necessary, the enforceability of the entire standard.

Detecting noncompliance by vinyl chloride sources is done primarily through self-reporting. Sources are required to report each relief valve discharge within 10 days of occurrence and to report exceedances of other portions of the standard on a semi-annual basis. Compliance monitoring should, for the most part, consist of review of these submissions, but periodic inspections of company records is needed to determine whether violations are going unreported. There are only about 55 sources in the entire country subject to the standard, with a heavy concentration (about half) in Region VI.

The roles of EPA and the States in the NESHAPs program are determined primarily by delegations of authority. Under Section 112, EPA may delegate a State the authority to implement and enforce the standards. Such authority is concurrent, so EPA may still enforce the standards in a delegated State.

The statutory requirements for formal Agency response to a NESHAPs violation differ from those applicable to a violation of a State Implementation Plan. EPA is not required to issue a Notice of Violation or to confer with a source prior to issuing an administrative order under Section 113(a) or bringing a judicial enforcement action under Section 113(b). The types of response available are more limited because EPA cannot issue a Delayed Compliance Order under Section 113(d).

EPA Headquarters has issued guidance on the types of enforcement response which should be considered and the circumstances in which each should be used. Further guidance will be issued in anticipation of the repromulgation of the asbestos standard. The memorandum issued on June 28, 1983 by Michael Alushin, Acting Associate Enforcement Counsel for Air, and Ed Reich, Director of the Stationary Source Compliance Division, entitled "Enforcement of the National Emissions Standard for Vinyl Chloride" (Attachment 11), is the most current and significant guidance on responses to violations of the vinyl chloride standard.

B. Enforcement of VOC Standards

An area of increasing focus of the stationary source compliance program is the regulation of sources emitting volatile organic compounds (VOC). Such

sources are major contributors to the ozone nonattainment problem and some emit compounds which are highly toxic in nature which may be reduced through an aggressive program to enforce VOC standards.

Generally speaking, widescale regulation of VOC was initiated by the 1979 Part D SIPs. As part of those SIPs, many States adopted regulations requiring compliance on or before December 31, 1982. It is the relatively recent passage of these compliance dates which has created the need (and opportunity) to increase the attention devoted to compliance efforts for VOC sources.

A wide variety of sources emit VOC. These primarily include sources in the petroleum industry and gasoline marketing chain and makers and users of various paints and solvents. Addressing the VOC compliance problem presents some differing circumstances from earlier compliance efforts. Most importantly:

- (1) The regulated community includes a greater proportion of smaller sources and the relative impact of the emissions of those sources is probably also greater than for particulate matter or sulfur oxides;
- (2) The applicable regulations are often more complex, including the "bubbling" of multiple VOC sources;
- (3) Averaging times for compliance with VOC standards are often longer than those associated with other pollutants; and
- (4) Compliance determinations are more heavily dependent on reviewing records and calculations than on traditional observation and testing approaches.

Efforts to address the problem of VOC compliance must recognize and account for these differences.

To assist in the coordination of efforts to improve the Agency's VOC compliance program, a VOC Compliance Workgroup has been established. This workgroup will serve both as a vehicle for Regional input into the development of Headquarters guidance on VOC and as a means for technical interchange of information among the affected Headquarters and Regional Offices.

At its first meeting, the workgroup discussed the status of various Regional VOC programs and what efforts will be required to assure a fully effective, consistent national program. A number of important conclusions about the status of the VOC program which became apparent from this meeting were:

- (1) Most Regional Offices have initiated significant efforts to address the VOC problem.
- (2) Most Regional Offices believe their inventories are roughly 80% complete for Class A sources. Data are particularly weak for non-extension areas. Additional work to refine these inventories would be beneficial. Contractors could be used for this purpose.
- (3) The contribution (and importance) of Class B sources is still unclear. Further analysis of SIP inventories will be necessary to define the degree to which EPA should focus on any portion of the Class B universe. (New York City was identified as one area where Class B sources are clearly very important.)
- (4) Much of the data on VOC sources are not reflected in CDS. Here again, contractor support could be productive.
- (5) Data being received from States on sources' compliance status is often spotty and of questionable accuracy. While efforts to work with States need to be continued, broader direct Federal effort, utilizing Section 114, will likely be required. This may need OMB approval under the Paperwork Reduction Act.
- (6) Effective workshop and training programs should be continued to meet both Regional and State needs.
- (7) There is a need for a source of technical expertise on the VOC industry which the Regional Offices can utilize in their compliance programs. Various options, including use of contractors, need to be explored.

A workplan to pursue these immediate needs is under development. Efforts to provide contractor support to meet the needs of the Regional Offices to improve their inventories and reflect the data in CDS have already been initiated.

C. Continuous Compliance

An area which merits further discussion is the subject generally termed "continuous compliance". Before discussing it in detail, it is worth articulating once again the nature of the problem.

As previously noted, the major compliance monitoring technique used in the air program is the inspection. Because of the limited resources available to Federal and State agencies, inspections of a source are infrequently more often than quarterly for even the most significant sources. More typically, inspections are performed only on an annual (or less frequent) basis. Further, even when inspections are performed, they do not normally involve stack testing. Generally, stack testing is routinely performed only for the initial demonstration of compliance and thereafter if there is reason to doubt the source's continued compliance. Continuous emission monitoring technology has not been widely used and data from a monitor is not usually usable as the sole basis for an enforcement action.

Given these limitations, it is fair to assume that compliance data being reported by States do not indicate what is happening at a facility on a day-to-day basis, but rather whether the source has been determined to be in compliance at an announced inspection after it has had the opportunity to optimize the performance of its control equipment. Thus, it indicates whether the source is capable of being in compliance rather than whether it is in compliance in its day-to-day operations.

It is generally recognized that many (if not most) sources have emissions which exceed allowable levels at some time during the year. These emissions are due to such factors as unavoidable process or control equipment malfunctions, inattention to proper operation and maintenance considerations and, in a few instances, deliberate attempts to avoid the costs of maintaining compliance. These emissions may or may not be excused under various malfunction provisions in effect in various States.

A study conducted in 1978 for EPA attempted to define with greater precision the magnitude of the problem. The study consisted of about 180 controlled

and supposedly well-maintained air pollution sources of various types and sizes. Due to a lack of source records, the study was forced to draw upon a host of sources of information, including operator anecdotes and post-hoc engineering judgment by the contractors conducting the data-gathering, to quantify source emission levels. The study found that sources were experiencing emissions which were significantly in excess of established limits. Major causes of the exceedances included improper design and inadequate operation and maintenance of process and control equipment.

These conclusions were generally confirmed when EPA recently concluded a contractor effort to develop a pilot inspection scheme with a Virginia regional office. The purpose of the study was to determine whether by improving the skills of State inspectors, they could do a more effective job in identifying operation and maintenance (O&M) related problems. The program involved, among other things, utilizing differing levels of thoroughness of inspection for differing situations. (See Section VII E for greater detail.) Quoting from the report of this study:

The 68 level 3 inspections of individual processes or emission units identified 25 sources (37%) as being out of compliance with either visible or particulate emission standards. Of the total number of processes or emission units inspected 46 (67%) were identified as having O&M related problems.

It should be pointed out that of the 25 sources for which compliance problems were identified, only 12 would have been identified as a result of a Level 1 inspection (i.e. type of inspection routinely conducted prior to the study).

In addition of the 46 sources for which O&M related problems were identified, none of the problems would have been identified through the use of a Level 1 inspection. (emphasis added)

The latter observation illustrates the difficulty of characterizing the status of continuous compliance. Current inspection methods and capabilities coupled with very limited self-monitoring requirements make detection unlikely. It also highlights the point that many States may assume that there is not a problem because they can't tell.

A separate part of the 1978 study previously referred to evaluated the ability of nine exemplary State and local agencies to operate in a continuous compliance mode. Not surprisingly, the study found that while the programs were basically sound, they lacked many of the tools needed to deal effectively with continuous compliance problems. Inasmuch as the study looked at cooperative, reportedly well-maintained sources and exemplary agencies, it is reasonable to expect that the results understate the actual situation.

As a result of the related findings that the problems were widespread and significant and that front-line agencies faced serious difficulties, a continuous compliance initiative was developed. The principal thrust of this initiative was a 5-year program of State capacity building. More specifically, EPA was to lead the development of a range of useful tools which States could implement on a voluntary basis, as necessary, to address specific operational problems. Whenever possible, State interest would be identified in advance and State participation obtained through pilot programs.

Severe resource cuts and conflicting priorities almost immediately precluded implementation of the initiative as originally conceived. Notwithstanding this, some of the elements of the initiative have been incorporated into EPA's present program. The Virginia study previously referred to is an example of this. Other examples are discussed in Section X of this strategy dealing with Compliance Promotion.

While it is clear that continuous compliance presents a significant compliance problem, the environmental impact is less clear. Ambient monitoring data have established that large portions of the country are already attaining the national ambient air quality standards. That ambient monitoring data should already reflect the effects of excess emissions which may be occurring but which are not otherwise detected. If those emissions are not sufficient to interfere with attainment of the ambient standards, if the ambient data are reliable, and if the ambient standards are truly protective of public health and welfare, the environmental effects of present levels of excess emissions due to the continuous compliance problem may be less significant than once assumed.

Clearly, though, the problem of emissions arising from poor operation and maintenance has the potential to become seriously aggravated if the enforcing agencies show an indifference to attempting to ensure that continuous compliance is maintained. It is equally clear that once a substantial investment of effort and money has been made by industry and government to assure that controls are installed, efforts should be made to assure that the full benefits of the investment are realized. Therefore, serious efforts to improve industry's ability to comply on a more continuous basis and to improve the ability of governmental agencies to determine compliance on a continuous basis must be maintained. This is especially true in relation to development of improved continuous monitoring technology, either for emissions monitoring or parameter monitoring.

Elements which could be directed at improving the ability of enforcement agencies to address continuous compliance in the near and mid-term include:

- (1) following up on the Virginia inspection study to provide information to States on upgrading their inspection function;
- (2) more flexible inspection programs;
- (3) greater use of unannounced inspections;
- (4) promoting expanded use of CEM technology;
- (5) greater information exchange on CEM usage;
- (6) developing improved methods for coal-sampling and analysis for sulfur content;
- (7) developing improved information on failure modes/compliance problems and disseminating that information;
- (8) compliance promotion activities of the type discussed in Section X; and
- (9) encouraging voluntary design standards and increased attention to design review in permitting.

While this strategy has touched on many of these elements, there is no present systematic approach to coordinate efforts on an Agency-wide basis. To faci-

litate development of a coordinated and effective program to address this issue, a supplemental continuous compliance strategy document is being developed.

A question may arise as to the priority of the continuous compliance problem (especially in attainment areas) relative to the potentially very significant initial compliance problem for VOC sources. At the State and local level, this requires a judgment as to the relative environmental significance of the two problems, a judgment which could lead to differing conclusions in different areas. At the Federal level, current resource levels will limit the ability of the Agency (especially at the Headquarters level) to address both problems to the extent it would otherwise like. To the extent there is a conflicting demand for resources, the VOC problem must take precedence. This is because so much of the country exceeds ambient standards for ozone, thus exposing the public to unhealthy air, and also because of the toxic nature of many of the constituents of the VOC compounds.

Incidentally, it is questionable if the continuous compliance problem will be of comparable relative magnitude for VOC sources. It well may be that the problem will be significantly less important. This can be hypothesized for the following reasons:

- (1) VOC sources are more often controlled by product reformulation, which would be less prone to intermittent excess emissions;
- (2) to the extent that VOC emissions arise from leaks (e.g., in petroleum storage facilities), the economics of recovering product have led to substantial efforts to minimize such leaks; and
- (3) to the extent that VOC emissions are reduced through control equipment, such equipment (usually an afterburner) is much less subject to malfunction than, for example, controls typically used for particulate matter.

In summary, a modest effort at developing tools to address the continuous compliance problem is worthwhile and is recommended although these efforts must fit within priority needs to address the initial control of VOC sources.

D. Emerging Issues Associated with the Application of Bubble Rules

1. Complexity Involved in Determining Compliance with Bubbles

An issue of relatively recent origin in the air program is the increasing complexity of applicable emission limits as sources and States take advantage of the provisions allowing use of "bubbles" in EPA's Emissions Trading Policy Statement. (The existing Policy Statement was published at 47 FR 15076 (April 7, 1982) and is effective as interim guidance pending issuance of a final policy. The Agency's original bubble policy was published in December 1979.) Under the bubble concept, a source with multiple emission points, each of which is subject to specific SIP emission limitations, may propose to meet the SIP's total emission control requirements for a given criteria pollutant with a mix of controls different from that required by the generally applicable regulations. The intent is to allow sources the opportunity to install controls with the same air quality impact but at less expense by placing relatively more control on emission points with a low marginal cost of control and less on emission points with a high cost.

Much of the Agency's experience with emission trades has occurred in the regulation of VOC sources. As discussed earlier in this strategy (see Part B of this section), determining the compliance status of VOC sources is often more difficult and resource-intensive than it is for other pollutants. When VOC sources operate under approved bubbles, the complexity of making a compliance determination is compounded. With a bubble, a large number of emission points becomes subject to an interdependent set of standards. If the bubble is one for multiple facilities, the calculations necessary to evaluate VOC compliance status can be quite lengthy; making the compliance determination requires an evaluation of the emissions of all the interdependent sources for the same time period.

Further complicating compliance determinations for some sources is the fact that the Agency has approved a few VOC bubbles with longer than daily averaging periods for the application of emission standards. The existing Policy Statement generally requires that the averaging time given by a State be on no longer than a 24-hour basis. However, the concept of a daily weighted average emission rate can pose problems for the States. Industry has argued that VOC emissions cannot be quantified on a daily basis. Surface coaters, for example, often do not use each VOC-emitting machine each production day. Consequently, States are under pressure to approve emissions trades with longer than daily averaging times.

EPA is sensitive to this issue and has allowed some trades that incorporate longer-term averages for VOC sources where a daily weighted average is impractical or application of RACT is not feasible on a daily basis. However, since many more sources can be expected to want to utilize VOC bubbles in coming into compliance, the issue of averaging times for VOC trades is one which will take on increasing importance. For emission trades with longer than twenty-four hour averaging times, an additional exercise involved in evaluating the source's compliance status is determining compliance with the daily emissions cap, which must also be part of the bubble.

The concern is that there reaches a point where this complicated regulatory structure, while being theoretically enforceable, becomes unenforceable in the real world. Sources subject to VOC bubbles must keep voluminous records for all their different product lines. To determine compliance at such sources, EPA or the State must devote very considerable efforts to making detailed calculations. While this situation need not preclude the Agency from pursuing the innovations created by the policy, the Agency should carefully monitor implementation of the policy to identify whether additional attention needs to be given to ways of ensuring compliance with emission trades.

2. State Application of Generic Bubble Rules

As originally promulgated in 1979, the bubble policy statement required the States to submit each approved alternative emission reduction plan to EPA for approval as an addition to the SIP. Beginning in April 1981 with the Agency's approval of New Jersey's generic rule for VOC emissions trading, however, EPA has approved several State generic bubble rules. In the context of the Agency's auditing of the information supplied by the State for each such emissions trade, the issue of ensuring the State's adherence to the specific provisions of the generic rule in the SIP and to the Agency's Emissions Trading Policy Statement, more generally, arises.

Experience to date reveals that under generic bubbles for VOC, States may be approving emissions trades which do not always meet the applicable requirements. Should EPA find that a State has approved an emissions trade that is substantially inconsistent with a generic rule in a SIP, the Agency will be in the position of having to so notify the State and specify necessary remedial measures. If the State fails to eliminate the inconsistency, EPA may have to enforce the original SIP limits. To avoid the necessity for such Federal action, it is therefore critical that now, when the States are just beginning to utilize their EPA-approved generic rules, the Agency make serious efforts to work with the States and ensure that emissions trades are consistent with generic rules. Otherwise the Agency will face a host of new problems to address in its air enforcement program.

X. Compliance Promotion Activities

Within the constraints imposed by present resource levels, efforts will be directed at continuing compliance promotion efforts presently underway. Compliance promotion, while in no way substituting for a strong enforcement program, recognizes that many sources would like to comply with applicable standards but

may not know that standards are applicable or understand what they need to do to comply. Compliance promotion includes both technical assistance and information exchange activities.

In the past, Agency efforts generally were reflected in traditional forms of training and technical assistance. In addition to the extensive training made available to both industry and government officials through EPA's Air Pollution Training Institute, EPA has expanded considerably its technical support for State and local enforcement agencies in recent years. This has taken the form of both an expanded workshop program and case specific assistance. As the skills of State personnel improve, they may be able to transfer some of that knowledge to the sources with whom they deal. In addition, EPA is committed to working more cooperatively with the Air Pollution Control Association (APCA), especially in encouraging and supporting efforts by APCA to play a larger role in educational and information exchange programs.

As a part of its technical support for State and local enforcement agencies, EPA prepares inspection guides for specific industries. These guides enable the regulatory agencies and industry to evaluate the operation and maintenance of a source's air pollution control equipment and to confirm that it is performing properly. The guides provide specific evaluation techniques for assessing operating problems, including cookbook-type procedures for inspections, worksheets for process and emission calculations, checklists for pre-visit, visit and post-visit information and observations, technically specific do's and don'ts based on many prior similar visits, and guidance as to why each step in the inspection process is necessary and important. The guides are of equal benefit to the source and the inspector and are often requested by the affected industrial concerns.

In a similar effort to promote information exchange, EPA has been working with industry and a trade association to develop a design review handbook for selected materials handling operations (physical processing and transport). The guide is intended to aid agencies and industry in identifying and addressing air pollution control equipment design factors to mitigate potential operation and maintenance problems. Permit-issuing authorities and the affected industries will benefit from this work by assuring that proper conditions are incorporated in permits and that these conditions are understood and followed by industry.

Over the past four years, EPA has worked in close cooperation with the electric power industry, the related trade associations, manufacturers of monitoring equipment, and State and local air pollution control agencies to facilitate continuing compliance at power generating facilities. EPA cooperative activities included a survey in 1979 with the Edison Electric Institute (EEI) to determine the degree of use by their members of continuous emission monitors and the associated technical and administrative problems. As a follow-up to the survey, EPA sponsored a 1980 national conference with EEI, CEM manufacturers, and air pollution control agencies attending.

The CEM technical deficiencies documented in the 1979 survey were discussed with the CEM manufacturers and subsequent significant improvement in CEM performance was noted. These first two important meetings established EPA as the clearinghouse for CEM information, a source that industry and State and local agencies would continue to use extensively. In addition to other activities, nine technical guides were developed over the last few years in the CEM area. Industry participated in the development of these guides and is utilizing the information in their daily operations. In addition, prompted by the success of cooperative efforts in the CEM area, the Agency has been working with other interested parties in a similar effort involving coal sampling and analysis procedures.

EPA has recently begun efforts to work with industry trade groups for sources regulated by VOC standards to develop ways to facilitate compliance by sources represented by those organizations. These efforts are particularly important for VOC sources due both to the relatively recent adoption of the standards and the large number of smaller sources which may be covered by those standards. Presumably, any efforts EPA makes to enhance the ability of these sources to understand their obligations and comply can be rewarded with some very significant air quality benefits.

As an example, EPA worked with the Can Manufacturers Institute (CMI) in producing a compliance handbook for the can coating industry which was furnished to State and local officials, EPA Regional Offices, and can coaters. The handbook takes a step-by-step approach in discussing the regulation, the rationale for the RACT values, important terms and definitions, and various compliance options. With this aid, can coaters and regulatory officials can better understand the process of can coating.

the various approaches for compliance, what those approaches mean to day-to-day operations, and compliance scheduling techniques. The handbook also includes a work sheet for determining allowable and actual emissions for compliance determinations.

As another example, in discussions with representatives from the National Paint and Coating Association, it was decided that it would be very beneficial for users of coatings and regulatory officials to have a uniform data base to work from when making determinations of compliance. It was agreed that if coatings were identified by the manufacturer as to their contents with a standard data sheet which would include all the major elements for making a compliance determination, this would generally eliminate the need for individual analysis by the user or regulatory official of each coating to determine its contents.

Therefore, manufacturers of coatings have agreed that if EPA can develop this data sheet with their concurrence, they will affix this sheet to all coatings that they supply. A proposed data sheet has been submitted to the manufacturers. If accepted, EPA will routinely accept this information about the coating as the basis for determining compliance without requiring further individual analysis although, if doubt exists, testing may still be required using the approved test method. This should eliminate much individual testing, which with inexperienced personnel would likely produce more questionable results. Through the cooperative efforts of EPA and industry, the burden on all parties is reduced and the likelihood of compliance enhanced.

As a final example, EPA is involved in a cooperative project with industry to assess the reliability of a variety of bulk gasoline terminal vapor control systems in various geographic areas. Approximately sixteen to twenty systems, involving three types of control systems, are being evaluated during monthly inspections over approximately a two-year period. An inspection manual with a specific checklist of what is to be observed will be a major output of the study. The manual, together with the data accumulated on the reliability of the control systems, should provide useful information to industry to assist in assuring better performance and provide useful design considerations for future construction.

EPA will continue to look for opportunities to work cooperatively with industry groups, especially in the VOC area, which present similar benefits. However, due to resource constraints, no formal institutionalization of this program is envisioned.

XI. Major Cross-Program Elements

While there are various points of intersection between the stationary source air compliance program and other Agency compliance programs, the two which have the greatest environmental significance are the use of Section 303 (emergency episode authority) and the NESHAPs program.

A. Section 303

In the course of implementing its authority under Section 7003 of the Resource Conservation and Recovery Act (RCRA), the Agency has begun to identify situations where the emissions to the air arising from a target site are presenting a substantial health problem. If an imminent and substantial endangerment to the health of persons can be documented, an action under Section 303 of the Clean Air Act as well as Section 7003 of RCRA is appropriate. A few such joint actions have already been filed. Appropriate communications links between the various Agency groups involved in the Clean Air Act and RCRA are just being formed and solidified. Such links are most critical at the Regional level.

B. NESHAPs

The NESHAPs program overlaps significantly with other media programs, particularly the toxic substances and hazardous waste programs. For example, a regulation adopted by the Office of Toxic Substances requires school districts to notify affected persons of the presence of asbestos in schools. Although removal of asbestos is not specifically required, many schools are proceeding with removal, an activity which may be subject to the NESHAPs regulations, depending on the amount of asbestos present. Each Regional Office should develop a means of coordinating the implementation of the asbestos in schools program with monitoring compliance with demolition and renovation requirements in the NESHAP.

The asbestos NESHAP also regulates disposal of asbestos waste. Improper disposal could be subject to an action under Section 7003 or Section 3008 of RCRA and under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (Superfund). So far, coordination of enforcement responses which may involve two or more of these statutes has been handled informally at Headquarters on an ad hoc basis. Regional Offices should assure that all relevant program and legal counsel components are involved in an early stage in developing the Agency response to violations of more than one statute.

Failure to report a vinyl chloride relief valve discharge would subject a source to liability under NESHAPs regulations and also under proposed regulations implementing notification requirements under Superfund. Should the Region detect a failure to comply with such a reporting requirement, an action under both the Clean Air Act and Superfund should be considered.

XII. Evaluating the Effectiveness of the Compliance Program

Unfortunately, the complexity of the air program and the inter-relationships between Federal and State activities militate against simplistic formulations for evaluating the effectiveness of the stationary source compliance program. In addition, as the program has matured, indicators which at one point may have been valuable become substantially less so and new measures must be found.

Use of compliance rates is illustrative of this problem. In the early stages of the program, significant improvements in the compliance rates were expected and were viewed as a measure of the effectiveness of the program. In recent years, the compliance levels have stabilized. Given that there will always be some level of noncompliance at any point in time, it is unrealistic to assume that compliance rates will continue to improve. If stable compliance rates are accompanied by vigorous activity to identify new violators and resolve existing ones, the program can be viewed as working successfully. If the stable compliance rates are reflective of the same violators over an extended period with little movement on and off the list of violating sources, the program is stagnant and ineffective.

Further complicating the picture is the fact that decreasing compliance rates can be more indicative of a healthy program than stable or increasing rates. For selected elements of the air program, this is probably the situation right now. Large numbers of VOC sources have fairly recently become subject to State and Federal regulation. A significant percentage of these sources are not yet incorporated into the CDS data base. It is reasonable to assume that violation rates are probably higher for these sources than for the rest of the regulated universe which has been complying (or attempting to comply) since the mid-1970's. The better the effort to identify these potential violators and reflect them in the data base, the more likely the compliance rates will decline. This effect has already been noted; for the first time in recent years the percentage of SIP violators increased during FY 1983. This effect is likely to continue for some time before efforts to resolve these violators causes compliance rates to begin to improve again.

Efforts to assure continuing compliance present a similar problem. As noted in Section V, present compliance rates tend to be overstated because they do not truly reflect intermittent violations associated with malfunctions, inattention to proper operation and maintenance procedures, and other factors which will not usually surface during an annual inspection but will inevitably occur to some degree in a plant's day-to-day operation. As techniques for determining continuing compliance improve, and compliance data become more truly indicative of day-to-day operations, compliance rates should decline. Such a decline, however, should be viewed as a positive indicator, not a negative one.

All this is not to suggest that compliance statistics are irrelevant or may not be useful indicators of the health of the program. It is intended rather as an indication that compliance rates are not by themselves adequate indicators, and that changes (up or down) cannot be used to evaluate the program without a full understanding of why the changes are occurring. The assumption that an increase in the compliance rate is a sign of a strong program and a decrease the sign of a weak program is invalid. In addition, compliance trends need to be evaluated for significant movements over an extended period of time rather than reacting to short-term marginal changes.

Another potential measure of the effectiveness of the program is the number of particular actions taken by EPA and the States, such as the number of orders issued or cases referred for litigation. While again this kind of data is useful in the context of an overall evaluation, it has too often been viewed as meaningful in and of itself. Most professionals in the program do not subscribe to this view. There are numerous ways of achieving the same objective, reflective of the different State statutory authorities, enforcement philosophies, problems, experiences, relationships with sources, and so forth. Focusing on the means to the end rather than the end itself (i.e., expeditious resolution of the violation) may reduce the available options for dealing with a problem. In addition, it may lead to taking simple cases rather than complex ones (if all cases are counted the same) and often leads to accusations that cases are being brought just to get the numbers up. In addition, especially in evaluating State data, definitional differences often complicate a meaningful analysis.

As with compliance statistics, numbers of enforcement actions may be valuable if properly used as an indicator of possible problems to be investigated. While "more" is not necessarily "better", the total absence of enforcement actions may be a cause for concern. Given the potential for misuse, however, enforcement statistics are not recommended as a primary tracking tool.

Another possible area, worthy of longer term evaluation, is the direct measurement of the environmental impact of the compliance program. This approach is being considered by the Agency but it is not yet readily usable in the compliance area. For this reason, it is not being considered, at least in the short term.

Based on experience to date, the following components are suggested as useful indicators at the national level of the various elements of the program's effectiveness.

- (1) evaluation of whether inspections are being performed in accordance with the Agency's inspection frequency guidance;
- (2) an indication of the degree to which new violators are being found;
- (3) a qualitative review of the effectiveness of the State's compliance assurance procedures;

- (4) a review of whether the compliance data are being sent to EPA and entered into CDS in a timely way;
- (5) a statistical summary of the numbers of violators brought into compliance or put on an acceptable schedule during the period; and
- (6) a close tracking of a defined category of violators to determine the success of State and EPA efforts to resolve the violations expeditiously.

Obviously, data needs at the Regional level will be more extensive.

The Agency's Management Accountability System has been established as the primary vehicle for tracking and measuring the effectiveness of the program at the national level. The accountability system requirements for FY 1984 involve quarterly reporting by each Region of the following:

- a. compliance status of major sources (Class A SIP, Class A1 SIP, NSPS, NESHAPs)
- b. number of newly-identified violators (Class A SIP, Class A1 SIP, NSPS, NESHAPs)
- c. number of violators placed on an acceptable compliance schedule (Class A SIP, Class A1 SIP, NSPS, NESHAPs)
- d. number of violators achieving final emission limitations (Class A SIP, Class A1 SIP, NSPS, NESHAPs)
- e. percentage of sources which should have been inspected within the most recent four quarters (Class A1 sources, NSPS sources, and NESHAPs sources) which actually were inspected either by EPA or the States
- f. For significant violators for each Region:
 1. number of significant violators at the beginning of the quarter not on an acceptable compliance schedule

2. number of newly-identified significant violators during the quarter, based on report from Regions
3. number of significant violators resolved during quarter:
 - number of violators placed on acceptable compliance schedules
 - number of violators achieving final emission limitations
4. number of significant violators still out of compliance and not on an acceptable compliance schedule

This system provides a useful quantitative data base for the type of analysis described earlier. To improve further the quality of this analysis, each Regional Office will be required to submit, at the conclusion of FY 1984, a summary report on the resolution of significant violators in its Region during the year. (For purposes of this analysis, significant violators newly identified during the fiscal year will not be included.) This report will contain the number of significant violators at the beginning of the fiscal year and, of these, the number which by the end of the fiscal year are in each of the following categories:

- (a) in compliance with final emission limitations
- (b) in compliance with a Federal schedule
- (c) in compliance with an acceptable State schedule
- (d) subject to a pending Federal enforcement action
 - (1) judicial
 - (2) administrative
 - (3) informal
- (e) subject to a pending State enforcement action
 - (1) judicial
 - (2) administrative
 - (3) informal
- (f) other

A brief narrative description of the status of all sources in (d)(3), (e)(3), or (f) will also be required. In addition, specific targets for accomplishing this activity will be defined.

For a more complete picture, such data need to be combined with an annual audit of State performance (especially qualitative elements) by the Regional Office and a periodic review by Headquarters of Regional Office performance under a mechanism similar to that established in the attached memorandum of April 27, 1983 on the FY 1983 Regional Air Compliance Program Evaluation (See Attachment 12).

One element which has proven particularly difficult to evaluate and incorporate into a formal reporting system is the expeditiousness of actions taken to resolve non-compliance. For this reason, there is a strong temptation to define precise time periods for certain actions to occur so as to have a basis for evaluating whether these target time periods are met. Countervailing concerns are that any such time periods may fail to recognize legitimate differences between cases and might serve to establish a lowest common denominator for action. While it is a close question, this strategy suggests not establishing such timeframes. However, in lieu of this, in any instance where a Regional Office is deferring to the State on an enforcement action, there must be a clearly documented record of the basis for deferral, the expected State action and timetables for that action, periodic reporting by the State to the Regional Office on the progress being made and, if progress is not timely, a re-evaluation of the appropriateness of continued deferral. While this information would not need to be routinely communicated to Headquarters, Regional Offices should be able to articulate this information upon request.

XIII. Plans for Future Guidance

The following is a list of subjects for which supplementary, detailed guidance is contemplated:

- (a) assuring continuous compliance by regulated air sources;
- (b) use of unannounced inspections by EPA;
- (c) use of continuous emissions monitoring excess emissions data in the compliance program;

- (d) enforcement of VOC standards;
- (e) enforcement of asbestos demolition standards;
- (f) enforcement of benzene NESHAPs (if promulgated and as necessary);
- (g) enforcement of arsenic NESHAPs (if promulgated and as necessary);
- (h) enforcement of radionuclides NESHAPs (if promulgated and as necessary); and
- (i) enforcement of PSD requirements.

XIV. Summary Identification of Major Changes from Existing Strategies

While the stationary source compliance program is considered to be a "mature" program, it is continually evolving as new challenges are presented. Because of this continual evolution, accompanied by guidance on specific issues as they arise, it was not anticipated that a need for major changes of direction would be identified in the course of evolving this strategy document.

This, in fact, proved to be the case. The three changes which are important enough to identify in this summary section are the major revision to the Agency's guidance on inspections frequency to provide more flexibility to States (discussed in Section VII C), the recommendation of a substantially increased use of continuous emission monitoring data in the Agency's standard setting and compliance programs (discussed in Section VII F), and the increased priority and attention given to sources of VOC emissions (discussed in Section IX B).

Compliance Strategy for Stationary Sources

Lists of Attachments

- Attachment 1 The Major Source Enforcement Effort --
May 11, 1981
- Attachment 2 Definition of Significant Violator --
See I, E, Attachment
- Attachment 3 Guidance Concerning EPA's Use of
Continuous Emission Monitoring Data --
See VI, D
- Attachment 4 Significant Violators -- See I, E
- Attachment 5 Enforcement Action Against Stationary
Air Sources Which Will Not be In
Compliance By December 31, 1982 --
See V, R
- Attachment 6 Guidance on Implementation of 1982 Deadline
Enforcement Policy Issued September 20,
1982 -- See V, S
- Attachment 7 Guidance on Use of Section 303 of the
Clean Air Act -- See IX, A
- Attachment 8 Duration of Section 113(a) Orders --
See V, O
- Attachment 9 Procedures for Review of Federal Register
Publication of Delayed Compliance Orders
Under Section 113(d) of the Clean Air Act --
See V, T
- Attachment 10 Use of Section 120 Noncompliance Penalties
to Promote Compliance by Stationary Sources --
See VII, I
- Attachment 11 Enforcement of National Emissions
Standard for Vinyl Chloride -- See IV, D
- Attachment 12 FY '83 Regional Air Compliance Program
Evaluation